

No. 181.

Reply Brief of Appellants.

In the

Dunlap for Appellants

Supreme Court of the United States.

October Term, A. D. 1901.

Filed Oct. 31, 1901.

THE UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH,
Appellants,
vs.
THE TERRITORY OF NEW MEXICO,
Appellee.
No. 181.

REPLY BRIEF OF APPELLANTS.

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Of Counsel.

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THE UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH, APPELLANTS,

v.

THE TERRITORY OF NEW MEXICO, APPELLEE.

No. 181.

REPLY TO THE POINTS AND AUTHORITIES CONTAINED IN THE BRIEF OF APPELLEE.

FIRST.

I.

The first point made by appellee is, that this court is without jurisdiction to hear this cause, by reason of the failure to comply with the act of Congress approved April 7, 1874. The proviso contained in the second section of the act of Congress referred to reads as follows:

"*Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict * * * shall be made and certified to

by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree * * *."

The certificate of the court below contains, among other things, the following recital (the italics are ours):

"The court hereby certifies for use upon the appeal of the said The United States Trust Company, of New York, and C. W. Smith, receiver, that this case was tried in the court below upon an agreed statement of facts, which agreed statement of facts was made part of the record in the District Court, and part of the record upon appeal to this court, and is to be a part of the record on appeal to the Supreme Court of the United States; that the said agreed statement of facts sets out the facts of this case which were heard or considered by this court upon said appeal, *and the same is hereby adopted by this court as its statement of such facts* for use upon the appeal aforesaid without here repeating the same." (Tr. p. 316.)

It not only appears that the agreed statement of facts upon which the case was heard in the court below was adopted and made a part of the record in the case before the Supreme Court, but it also appears that the same was adopted by the Supreme Court "*as its statement of such facts for use upon appeal.*" This certificate, we submit, shows a direct and full compliance with the provisions of the Act of Congress referred to. It is a duplicate of the certificate procured by the learned counsel in his appeal to this court in the case heard and determined in the case of the Territory of New Mexico, appellant, *v.* C. W. Smith *et al.* (172 U. S. 171).

II.

It has been held by this court, in many cases, that an agreed statement of facts, made part of the record,

in a case tried by a court, without a jury, is the equivalent of a special verdict, and constitutes a sufficient compliance with the provisions of sections 649 and 700 of the Revised Statutes of the United States, which, in their requirements, are substantially equivalent to the act of Congress hereinabove referred to. In the case of Supervisors *v.* Kennicott (103 U. S. 554), Chief Justice Waite, in delivering the opinion of the court upon this question, said:

"Even before the act of 1865, c. 86, sect. 4 (13 Stat. 501, reproduced in sections 649 and 700, Rev. Stats.), it was always held that a judgment on agreed facts spread at large on the record should be reviewed here on a writ of error. (U. S. *v.* Eliason, 16 Pet. 291; Simpson *v.* Baltimore & Susquehanna Railroad Co., 10 How. 329; Graham *v.* Bayre, 18 *id.* 60; Suydam *v.* Williamson, 20 *id.* 427; Campbell *v.* Boyreau, 21 *id.* 223; Burr *v.* Des Moines Co., 1 Wall. 99.) Such a statement was considered to be equivalent to a special verdict, and to present questions of law alone for the consideration of the court."

Justice Brewer, in speaking for this court in the case of Lehnan *v.* Dickson (148 U. S. 73), said:

"It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as an equivalent of a special finding of facts. Supervisors *v.* Kennicott, 103 U. S. 534."

In the case of Stringfellow *v.* Cain (99 U. S. 610), it was held by this court, on an appeal from the Supreme Court of the Territory of Utah, that the adoption by the Supreme Court of the Territory of findings, made by the District Court, would be a sufficient statement of the facts of the case, within the meaning of the act of Congress approved April 7, 1874.

Again, in the case of Haws *v.* Victoria Copper Mining Co. (160 U. S. 303), Mr. Justice White, in delivering the opinion of the court, says:

"The statement of facts contemplated by the statute is one to be made by the Supreme Court from whose judgment the appeal is taken. But where that court confirms the findings of the trial court, being those adopted by the Supreme Court of the Territory, they subserve the purpose of a finding of fact on the appeal to this court. Stringfellow *v.* Cain, *supra*."

See also, to the same effect:

Apache County *v.* Barth, 177 U. S. 540.

III.

Many of the most important questions presented by the record in this case grew out of the ruling of the Supreme Court in affirming the judgment of the District Court, in overruling the motion to dismiss this intervening petition; in overruling the plea in abatement filed; in overruling the plea in bar filed; and in overruling the demurrer. Each one of the questions above mentioned can be considered by this court, upon this appeal, regardless of the question as to whether it can review, or not, the facts considered by the courts below upon the trial of this case upon its merits.

IV.

It is true that the agreed statement of facts used in the court below, and adopted by the Supreme Court, contained, in relation to the disputed fact as to whether any notice of the assessment in controversy was given or not, the conceded testimony of several witnesses, and as to this question it did not, and does not, state fact agreed upon, but

simply the evidence *pro* and *con* thereon; but the Supreme Court of New Mexico made a finding of fact upon this testimony, finding that a notice was sent to the solicitors of the Receiver and of the Trust Company (Tr. p. 317). The agreed statement of facts also contains the conceded testimony of two witnesses concerning one other fact that could not be agreed upon, to wit, the question of the value of the railroad property for the purposes of taxation. The Supreme Court again found upon this testimony the ultimate fact (Tr. p. 317).

SECOND.

I.

The second point made in the brief of appellee, is that "the purchasers at the foreclosure had ample notice of the claim of the Territory." While this statement is entirely incorrect, and not supported by the record, it would be very difficult to understand what force it would have if it were correct. The argument of counsel in support of it seems to be made for the purpose of establishing another proposition, to wit, the proposition that the purchasers at the sale of the property in controversy, were given the notice required by the final decree of foreclosure of the intention on the part of the Territory to file this intervening petition. The entire basis upon which the proposition and the argument is made, as contained in the record, is the following statement of Mr. Clancy, in an affidavit filed by him upon the hearing of the motion to dismiss, and the facts contained in the agreed statement of facts, each of which are as follows:

"Affiant states that at the time of the presentation to this court of the report of the foreclosure sale in this cause and the asking of a confirmation of said sale, he attended before the court for the purpose of having inserted in the order of confirmation a provision that the sale was made subject to the payment by the purchasers or their successors or assigns of any unpaid taxes which might be adjudged to be a lien upon the property sold; that at said time there were present Mr. Aldace F. Walker and Mr. Victor Morawetz, two of the purchasers at said sale, and perhaps Mr. R. Somers Hays, the third purchaser, but of this affiant is not now certain; there were also present Mr. C. N. Sterry and Mr. E. D. Kenna, who was and is, as affiant understands, the principal law officer of the whole Santa Fe system of railroads;

that at said time and place affiant stated that arrangements had been made for his employment by the counties of Bernalillo and Valencia, under authority of an act of the legislative assembly of 1897, for the purpose of prosecuting claims against the property sold for taxes, which had been levied for four or five years in said counties, the validity of which was in dispute, the railroad authorities claiming that the Congressional exemption set out in the second section of the act of Congress of 1866, incorporating the Atlantic and Pacific Railroad Company, extended to the property upon which the taxes had been levied; that a long discussion ensued, in the course of which affiant distinctly recollects that it was urged by some of the gentlemen present that the decree of foreclosure had said nothing on the subject of unpaid taxes, and that it was not fair to the purchasers to saddle them with any additional liability in the order of confirmation, to which affiant replied in substance that if the purchasers had been misled or deceived by the decree of foreclosure it was not too late for them to recede from their purchase and refuse to take the property if additional and unexpected burdens were imposed; that in answer to a suggestion made, as affiant now recollects by Mr. Kenna, that if the taxes were a lien on the property that lien could not be divested by the sale of the property, affiant answered in substance that in his opinion this was true, but he desired to have inserted in the order of confirmation such a provision as he asked, so that it would be impossible for the purchasers at any future time to set up that they had made the purchase without notice of the existence of such claimed taxes and thus to eliminate one possible point of dispute or discussion in any later proceeding. Affiant further states that as a final result of the said discussion, and by agreement of the counsel present, there was inserted in the said order of sale such a provision as he asked, in language drafted by Mr. Kenna, approved by affiant, and assented to by the purchasers present, that clause being in the words following, to wit: 'including also any taxes which may finally be adjudged to be a lien upon the property and sold under the decree aforesaid.' (Affidavit, Tr. pp. 125–126.)

"That at the time of the confirmation of the sale under

the decree of foreclosure, F. W. Clancy had been retained to collect any back taxes that might be due upon the property of the railroad company in Valencia county for any of the years referred to, and that at that time he stated to the court in the presence and hearing of the purchasers that he did not wish such purchasers to afterwards say that they had purchased said property without notice of the fact that there were claims for taxes in the two counties of New Mexico through which said railroad ran, covering a series of years, which were to be enforced, if possible, as a lien upon the property of said railroad company, one of which claims, that for the county of Bernalillo, had already been disposed of adversely to the county in the Supreme Court of New Mexico, and was then standing upon appeal taken by the Territory to the Supreme Court of the United States." (Agreed statement of facts, Tr. p. 284.)

The court will remember, that at the time of the confirmation of this sale, the taxes sought to be recovered by this intervening petition, were not yet levied; the assessments, on which they were based, were not yet made; that there were upon the tax rolls of Valencia county, at that time, assessments of the property in controversy for each of the years involved, with a levy of taxes extended against such assessments. It is therefore apparent that the taxes Mr. Clancy talked about at that time, and the taxes referred to in the decree of confirmation, were taxes that were then apparently in existence and apparently levied upon this property, *and not taxes which were to be levied in the future.* A notice to the purchasers that Mr. Clancy had been employed to collect taxes then existing would not be a notice to such purchasers that he was going to file an intervening petition for taxes to be levied more than a month afterwards, upon assessments not then made.

II.

We are not aware of any suggestion in our original brief that the purchasers should have been made parties to this intervening petition, as stated by appellee on page 11 of its brief. If, as stated in our original brief, the appellee had made a demand for the taxes sued for, and then had given notice of an intention to file an intervening petition to recover the same, the purchasers, or their assignee, would have had the notice required by the decree, and would have been compelled to assert the option given them, of either making themselves parties or permitting a default.

III.

It is asserted on page 11 of appellee's brief that Mr. Sterry was employed by the purchasers for any pending or future litigation against the receiver. This, as we have shown on page 63 of our original brief, in answer to the same assertion by the learned court below, is incorrect.

IV.

On June 2, 1897, the master made a deed to the purchasers of the property in controversy. (See appellee's brief, p. 3, and agreed statement of facts, Tr. p. 283.) Pursuant to each of the decrees, upon the conveyance of this property by the master, the purchasers, or their assignee, had the right to immediate possession of the property involved, and the property passed out of the custody of the court, the receiver thereafter holding it as trustee for the owners (Very *v.* Watkins, 23 How. 474), so that, when the intervening petition was filed the court no longer had custody of the property, although its receiver did not act-

ually deliver the property to the assignee of the purchasers until twenty days after the filing of the intervening petition.

Appellee seems to make some point upon the fact that the deed itself was not recorded until June 12th, and that the public had no notice of its existence until its record, ignoring the fact that its learned counsel, representing it, was before the court, at the time of the confirmation of the sale to the purchasers, for the purpose of insisting upon certain things being entered in the decree of confirmation for the protection of appellee. The appellee, at the date of confirmation, received full knowledge of the fact of the sale of the property, its confirmation and the transfer thereby of the equitable title thereto, to the purchasers, and the right of the purchasers, at any time thereafter, to receive a conveyance and a delivery of the possession of the property. In view of this, it hardly lies in the mouth of the appellee to say that it was in ignorance of the fact of the conveyance of the property, until the public record of the deed of conveyance on June 12th.

THIRD.

It is insisted, under the third point in appellee's brief (see pages 12 and 13), that the court had the custody of this property at the time when these proceedings were commenced, and hence that the proceedings were properly commenced, and a sufficient notice thereof was given to the purchasers by notifying the receiver and the Trust Company. In making this contention, appellee, on page 13 of its brief, insinuates, rather than asserts, that no deed was executed on the 2d of June, by twice quoting from an affidavit of Mr. Sterry made upon the motion to dismiss. That the deed was actually executed and delivered on June 2d appears from the statement of facts made by the learned counsel for appellee, on page 3 of his brief, and also from the agreed statement of facts made by the court. (Tr. p. 283.)

It seems hardly necessary to say in answer to this contention that the appellee and its learned solicitor, knowing of the sale of the property in controversy to the purchasers, and its confirmation by the court more than thirty days prior to the filing of the intervening petition, were not attempting to invoke the aid of the court in enforcing the provision that the purchasers should pay as part of the purchase price the taxes claimed. The court having passed the legal title to the property by the deed, with the right of possession upon demand under the decision of this court (Very *v.* Watkins, *supra*), divested itself of the control of the property, and hence the only relief it could possibly have granted upon this intervening petition was to order the payment of the claims presented out of the funds in the hands of the receiver, a matter which would not have concerned the purchasers, but would have concerned the trust company and the receiver, and hence the requirement of notice to these parties and to no one else.

FOURTH.

I.

It is contended by appellee, on pages 14 to 17 of its brief, that when the collector acts, under the provisions of section 4056 of the Compiled Laws of New Mexico (set out on page 16 of its brief), no particular description of the property assessed is necessary. The statutes quoted by the learned counsel, on pages 15 and 16 of themselves refute the point made. In the first place the assessor must visit each tax payer and exact from him, in writing, a list which shall describe specifically the real estate owned by such tax payer, subject to taxation, either by legal subdivisions or otherwise sufficient to identify it. When the collector puts an additional assessment of property upon the tax list, as property omitted from the assessment roll, the requirement is that he shall list it. The listing required of the collector in such a case is the listing required of the tax payer by the assessor, and must embrace the same sort of description that the list exacted from the tax payer is required to contain.

Lehrman Durr & Co. *v.* Robinson *et al.*, 59 Ala. 219.
Cooley on Taxation (2d ed.), pp. 351–404.

As stated by Judge Cooley in his text:

"In listing the land it must be described with particularity sufficient to afford the owner the means of identification and not to mislead him. * * * The purposes in describing the land are, first, that the owner may have information of the claim made upon him or his property. * * * 'Notice,' it is well said, or at least the means of knowledge, is an essential element of every just proceeding which affects the rights of persons or of property. But how can the duty of the payment of taxes be performed

without the identity of the subject-matter of the duty being made known to him who is to perform it, by name or description?"

Cooley on Taxation (2d ed.), pp. 404, 405.

See also authorities cited in notes to text.

II.

In the case at bar there was ninety-three miles of right of way in Valencia county. Some of this right of way was claimed by the taxing authorities in 1895, and subsequently, to have been acquired over lands held in private ownership; it is, however, conceded that the railroad company claimed that its entire right of way was over public lands, as it never bought, purchased, or condemned a foot of it, hence the necessity of describing the portion claimed by the authorities to have been acquired from lands held in private ownership and therefore taxable, was and is clearly apparent, which was not done in the additional assessments in controversy.

III.

Assuming that the court had jurisdiction to entertain this intervening petition, and to determine any claims contained therein to be a lien upon the property involved, upon what part of the ninety-three miles of road mentioned in the intervening petition was this lien to be established?

The right to bring an action to recover these taxes is regulated by section 4157, of the present Compiled Laws of New Mexico, which were in force at the time of the filing of this intervening petition. (Appendix to original brief, page 164.) This statute provides that, "if the taxes be a lien upon any real estate the facts shall be stated in the declaration, together with the description of such real es-

tate." Neither in the assessment nor in the intervening petition was there any attempted description of the right of way, which was claimed was not exempt from taxation. It therefore seems to us, as we urged in our original brief, that the demurrer to the intervening petition should have been sustained.

IV.

The argument of the learned counsel for appellee, on page 14 of his brief, is in direct opposition to the text of the learned author, whose work we have already cited. It is urged that the questions raised by the demurrer are not worthy of much consideration on account of the fact that it was not filed until two years after the intervening petition was filed. The court will remember, in answer to this contention, that the intervening petition was filed on June 10, 1897, and dismissed on June 22, 1897, hence it was not in court to have anything filed to it until its reinstatement in September, 1899, and then immediately following its reinstatement, or within less than thirty days, the demurrer in question was interposed to it.

Fifth.

I.

In reply to the argument contained under the sixth point of appellee's brief (pages 18 to 23), we have to say, in addition to the arguments in our original brief, that the right of way itself, being placed upon the assessment roll in each year up to 1895, included all of the superstructure that had been placed upon it, and therefore such superstructure was not omitted from the assessment rolls of 1892, 1893, and 1894. In 1895 and 1896 the assessments placed upon the rolls by the assessor at the proper time were of the identical property attempted to be placed on the rolls by the collector in 1897. (See pages 18 and 20 of appellee's brief.) The description of the property, as we say, was identical; it was of the superstructure placed upon the right of way, and not of the right of way itself, and the assessment in each of these years fixed the value of such property so listed at $6,500.00 per mile. While it is true that it alleged there were 93.7 miles, yet it was no more incorrect in that respect than was the assessment made by the collector. The collector says that there were 60.7 miles not exempt, when, as a matter of fact, under any construction, there was only some 55 miles that was assessable. If the assessment made by the collector was valid as to property not exempt, in that the fixing of the rate per mile would enable the court to determine when the actual mileage was found the amount due, the same reasoning would necessarily apply to the assessments made by the assessor in 1895 and 1896. Counsel says, on page 21:

"The collector in the present case listed 60.7 miles of the road running over land held in private ownership when

the railroad company acquired this road, all of such road being clearly taxable. He has assessed nothing except taxable property. The proof shows that his estimate is too much, and that there are only 55.5 miles of such road. On account of this mistake, certainly the would be evader of taxes cannot be heard to say that the whole assessment is void and he will pay nothing."

Wherein is the reasoning of the learned counsel less applicable to the assessments of 1895 and 1896 made by the assessor and quoted on page 20 of his brief?

II.

The learned counsel, on page 22, asserts that it makes no difference to the "*would-be evader of taxes*" whether they pay under the original or under the additional assessments for 1894, 1895, and 1896. This statement is incorrect, as to the year 1894. In the year 1894 the original assessment of the right of way, made by the assessor, was $607,477, while the amount of the assessment made by the collector for the same year is $609,050 (see Exhibit 9, Tr. p. 193, and Exhibit 10, p. 196). For the years 1892 and 1893, the assessment made by the collector was nearly double that which was made by the assessor. (See Tr. p. 178; Exhibit 6, p. 183; Exhibit 7, p. 186; Exhibit 8, p. 190.)

This is not an action wherein the appellants are seeking to restrain the collection of some taxes, and would therefore have to tender such taxes as might be legally due, but it is an action in which the Territory is seeking to enforce specific levies of taxes, and hence appellants have a right to say that, if these levies were made upon an assessment that was absolutely void, and the assessment and the levies were made without authority of law, they cannot be enforced in this action, though the action itself be an equitable one.

Sixth.

I.

In reply to the proposition made by the learned counsel under his seventh point, on page 23 of his brief, that the collector, on June 7, 1897, had a right to make these additional assessments on the tax list for 1896, we desire to say, in addition to that already stated in our original brief, that the laws of New Mexico require that all taxable property should be listed, assessed, and taxed each year, in the name of the owner, on the first day of March. (See appendix to original brief, p. 156, sec. 2816.) This is in accordance with the usual custom.

Cooley on Taxation (2d ed.), p. 354.

This provision applies equally to property which is to be placed upon either the assessment roll or the tax list as property omitted in previous years. This court had occasion to examine a very similar statute in relation to the assessment of omitted property in Minnesota, in the case of Winona & St. Peter Land Co. *v.* State of Minnesota (159 U. S. 526), in which it was contended that the placing of omitted property upon the tax list, and assessing it for the taxes of the years when it was omitted from the assessment rolls, was unconstitutional, in that it was taking property without due process of law, and in answer to this point, Mr. Justice Brewer, delivering the opinion of the court, said:

"If any real or personal property shall be omitted in the assessment of any year or years and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on

the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against such property with seven (7) per cent. interest thereon, from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax list for the current year.

"This being an amendatory statute, places the amended section as part of the general tax law, and it is to be construed accordingly. The section provides that if any property shall have been omitted from the assessment of any year it shall, upon discovery of that fact, be entered upon the assessment and tax books for that year; that all taxes for that year be charged thereon against it, with interest, and then extended against it on the tax list for the current year. In other words, for the purposes of collection, it stands on the tax list for the current year the same as any other property, and all taxes thereon are to be collected in the same manner. The amount of the tax for the omitted year is the same as that which was enforced against all other properties for that year, so that the only difference is in the mode of assessment and the charge of interest."

The learned Justice then proceeded to show that the general statutes in relation to taxation gave each person, during each current year, the notice required by law to be given, in order to prevent the taking of property without due process of law.

If the statutes of New Mexico are to be construed as providing that the collector of taxes can, in the middle of a fiscal year, place property upon the tax list of the preceding year, assess it, and extend a levy of taxes against it, without any notice to the owner of the property of such action, then the enforcement of such taxes must be held to be the taking of property without due process of law. On the other hand, if the collector, in placing property as

omitted property upon the tax list, must place it upon the tax list of the current year in which he acts, then such notice as is required by law is given to the owner of such property, under the many decisions of this and other courts.

Seventh.

The eighth point in the brief of appellee states the proposition, that "there was an opportunity to appeal from the additional assessment made by the collector." The argument made by the learned counsel under this point is, in substance, that the United States Trust Company and the receiver were each notified of the filing of the intervening petition, which of itself disclosed that these assessments had been made. The obvious answer to this is, that neither the receiver nor the Trust Company were interested in taking any appeal, as neither of them had any interest in the property, which at that time had been conveyed to the purchasers; but if they or either of them had the right to take an appeal, there was nothing contained in the intervening petition giving them notice that they should or could exercise such right. A reference to the intervening petition and its exhibits will show just what the tax list of Valencia county for 1896 show, and that is, that the dates of the making of these additional assessments were either purposely or otherwise omitted from the tax list when these assessments were first called to the notice of anyone by the filing of the intervening petition. The receiver and the Trust Company had the right to assume that these assessments on the tax list for 1896 were made by the collector between the first day of September, 1896, and the first day of January, 1897, or at the latest the first day of March, 1897, and that the time to appeal, even if an appeal could be taken within a reasonable time, had expired long prior to the filing of the intervening petition.

The learned counsel, in further argument upon this proposition, suggests that the collector had no necessity of

notifying the owners of this property of these assessments, because—

"he could not know they were interested parties, because the deed to the purchasers, made as of the date of June 2, 1897, only five days before he acted, was not placed of record until June 12, 1897, five days after he acted."

The learned counsel, in making this statement, surely forgot the fact that under his employment he was present at the time the sale to the purchasers was confirmed, and had exact knowledge that the property in controversy had been sold, and who the purchasers were, two of them being present at the confirmation. With this knowledge the learned counsel prepared a notice for the collector at the time of his making this assessment on June 7, and instructed the collector to give such notice to the solicitor of the receiver and the Trust Company only. (Tr. p. 282.)

It is not going out of the way to say that under the facts it is apparent that there was an intentional omission to notify the purchasers of the fact of this assessment.

EIGHTH.

The ninth point in appellee's brief makes the proposition that the listing of the omitted property, on June 7, 1897, and the extending of taxes for the previous years against the valuation made at that date, created a lien upon the property, as of the date in each of the respective years the county commissioners made for such years their levies. The only authorities cited by counsel in support of this proposition are Peters *v.* Meyers (22 Wis. 576). This case, upon examination, will be seen to be entirely inapplicable, as it was based upon express statutory provisions of the State of Wisconsin.

Section 4057 of the Revised Statutes, quoted on page 27 of appellee's brief, provides that "taxes upon real estate are hereby made a lien thereon from the date of the levy thereof" It must be conceded that no taxes can be levied upon real estate under a system of taxation such as was in vogue in New Mexico without a preceding assessment. As stated by Judge Cooley in his work on Taxation:

"An assessment, when taxes are to be levied upon a valuation, is obviously indispensable. It is required as the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation."

Cooley on Taxation (2d ed.), pp. 352, 353.

The listing and the valuation of this property, which constituted the assessment made by the collector, was not made until June 7, 1897. Until that was made there were, and could be, no taxes levied against this property. The levy

required to be made by the Board of County Commissioners becomes effectual only when it is indorsed upon the assessment roll, under the seal of the Board; hence the levies for 1892 to 1896, inclusive, indorsed upon the assessment rolls for each of those years, were not levies upon any property not contained in each of such assessment rolls.

The purchasers at the sale of the property in controversy were notified by Mr. Clancy that there were taxes claimed for preceding years; they were by such notice charged with everything that appeared upon the assessment and tax rolls concerning this property at that time, but necessarily were not charged with notice of an assessment and levy not in existence, and which was not made until thirty days after their purchase. See in this connection authorities cited on page 70 of our original brief.

All of which is respectfully submitted.

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